Circuit Court for Montgomery County
Case No. C-15-CR-23-000956

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 2313

September Term, 2023

MARCOS NOEL RIVAS

v.

STATE OF MARYLAND

Friedman,
Ripken,
Kehoe, S.,

JJ.

Opinion by Ripken, J.

Filed: May 13, 2025

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

Marcos Noel Rivas, Appellant, was charged with second-degree burglary and possession of a firearm by a prohibited person. A trial was held in the Circuit Court for Montgomery County in November of 2023. Appellant was found guilty of theft and of possession of a firearm by a prohibited person, and found not guilty of burglary. In January of 2024, the court sentenced Appellant to seven years of incarceration for possession of a firearm and a concurrent six months of incarceration for theft. Appellant noted a timely appeal of the convictions.

ISSUES PRESENTED FOR REVIEW

Appellant presents three issues for our review, which we have rephrased:[1]

I. Whether the circuit court abused its discretion by permitting a lay witness to testify regarding fingerprint recovery.

II. Whether the circuit court abused its discretion by permitting the State's rebuttal closing argument regarding the stolen handgun.

III. Whether the circuit court abused its discretion by finding that the State adequately established chain of custody for the handgun.

For the reasons that follow, we shall affirm Appellant's convictions.

[1] Rephrased from:

1. Did the trial court err in allowing Detective Lucas Hechs, a lay witness, to give expert opinion on whether handguns have good surfaces for the recovery of fingerprints?
2. Did the trial court err by allowing the prosecutor's improper and prejudicial rebuttal closing argument?
3. Did the [] State fail to establish that the gun recovered by Rockville Police was the gun introduced into evidence at trial?

FACTUAL AND PROCEDURAL BACKGROUND

Precipitating Incidents

On the morning of July 16, 2022, Mohammad Khalid ("Khalid"), the owner of Mike & Sons Sub Shop ("Mike & Sons"), reported that the store had been broken into. Officer Jacob Donahue ("Ofc. Donahue") with the Montgomery County Police Department responded to the scene. Khalid informed Ofc. Donahue that the perpetrator had stolen cash from the register and tip jars, several cases of beer, and Khalid's handgun, a Glock 48 which he had stored in a filing cabinet. Khalid had a video surveillance system which captured the incident. Khalid was unable to extract the video footage for the police; however, Ofc. Donahue recorded portions of the video footage using his department-issued cell phone. The video depicted the perpetrator putting on latex gloves approximately one minute after breaking in through the back door. The video also depicted the perpetrator using a flashlight. Khalid also provided Ofc. Donahue with the serial number for his handgun which Ofc. Donahue logged into the National Crime Information Center ("NCIC").[2]

Three days later, on July 19, 2022, Corporal Brandon Thomas ("Cpl. Thomas") and Corporal Lally[3] ("Cpl. Lally") of the Rockville City Police Department approached Appellant and several other individuals who were seated in a public park drinking beer.

[2] Ofc. Donahue described NCIC as a nationwide database used by law enforcement agencies to log information regarding missing and stolen serialized items, such as a handgun with a serial number.

[3] Cpl. Lally's first name is not provided in the record.

While questioning Appellant and the others, Cpl. Thomas noticed a handgun underneath Appellant's right leg. Cpl. Thomas seized the handgun, "rendered it safe" by racking the slide to the rear and removing the magazine, and placed Appellant under arrest. Cpl. Lally submitted the gun and magazine into evidence. A search of Appellant's bag revealed a flashlight and latex gloves, neither of which were collected as evidence. The parties stipulated at trial that Appellant was prohibited from possessing a regulated firearm.

Trial Proceedings

At trial, Khalid testified to the events of July 16, 2022. He was shown a photograph of the handgun—which he indicated he had taken shortly after purchasing the handgun and which was marked as State's Exhibit 13—and confirmed that it was his handgun based on the visible serial number. He was also shown the handgun itself, marked as State's Exhibit 14, and confirmed, based on the serial number, that it was his handgun. Khalid admitted that he had provided false information on his application for a handgun license regarding his expunged criminal record. State's Exhibits 13 and 14 were admitted into evidence.

While testifying, Ofc. Donahue was asked about his decision not to attempt to collect fingerprint or DNA evidence from the store. Ofc. Donahue explained his decision, including that based on the surveillance video he believed that the perpetrator had worn gloves, and that he believed fingerprints from employees and customers may have made it difficult to collect useful evidence.

Cpl. Thomas testified to the events leading to Appellant's July 19, 2022 arrest. He recounted that he had collected the names of the individuals present and run them through NCIC and other law enforcement databases. He stated that the handgun was collected as

evidence; however, Appellant's bag and its contents were sent to jail with him as personal property. Cpl. Thomas stated further that at the time of Appellant's arrest, he was not aware of a burglary at Mike & Sons; however, he later became aware. Portions of Cpl. Thomas's body worn camera footage depicting the arrest were played for the jury. This included footage of the handgun on the ground after Appellant had been moved away from the handgun. Cpl. Thomas described the process he used to render the handgun safe and the process of placing a handgun into evidence. Cpl. Thomas was shown State's Exhibit 14 and confirmed it to be the handgun he seized during the arrest of Appellant.

At the close of the first day of trial, the State noted an intent to call Cpl. Lally as a "chain of custody" witness. The State noted that Cpl. Lally had a scheduling conflict which would not allow him to testify the following day. However, Cpl. Lally had left the courthouse prior to being called as a witness and, thus, did not testify.

Detective Lucas Hechs ("Det. Hechs"), a member of the Montgomery County Police Department whose job includes the test firing of seized firearms, also testified at trial. He described the process of retrieving seized firearms from evidence, confirming them to be the correct item, and testing whether they are functional by firing projectiles in a controlled environment. He explained that pursuant to the forensic lab's policy, two officers were required to be present throughout the entire process. He testified that he had assisted in test firing the handgun seized from Appellant and confirmed it to be working. He prepared a certificate to that effect which was admitted into evidence. The certificate included the serial number of the handgun. Det. Hechs was shown State's Exhibit 14 and confirmed it to be the handgun he had test fired.

During the defense case, Appellant called Francisco Cruz Lamos ("Lamos") as a witness. Lamos was a friend of Appellant who had spent much of July 19, 2022 with him and was present during the arrest of Appellant. Lamos testified that he had not seen Appellant handling a handgun that day.

The case was submitted to the jury. The jury found Appellant guilty of theft and possession of a firearm on July 19, 2022. The jury found Appellant not guilty of second- and fourth-degree burglary and of possession of a firearm on July 16, 2022. Additional facts will be discussed as they become relevant.

DISCUSSION

I. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION BY ALLOWING DET. HECHS TO TESTIFY REGARDING FINGERPRINT RECOVERY.

During cross-examination, Det. Hechs was asked about his choice not to wear gloves while handling firearms for test firing. Det. Hechs explained that if a firearm was to undergo fingerprint testing, that such collection of potential fingerprints would be completed prior to test firing. On redirect, the following exchange took place:

> [STATE]: What do you know about whether handguns are good surfaces for recovering latent fingerprints?
>
> [DEFENSE]: Objection, Your Honor.
>
> THE COURT: Overruled.
>
> [DET. HECHS]: Minimal. I would know that smooth surfaces are easier to get prints off of. Just from my experience as a patrol officer, dusting prints out of vehicles saying the glass will be easier than the dashboard, but the latent print examiners may have other tools that they would use to get prints off other surfaces.

> [STATE]: Okay. Textured surfaces, worse surfaces for the possibility of recovering latent fingerprints.
>
> [DET. HECHS]: Yes, like I said, the window of a car would be easier than the dashboard.

A. Party Contentions

Appellant contends that this testimony was impermissible expert opinion testimony provided by Det. Hechs, who was a lay witness. Relying on *Ragland v. State*, 385 Md. 706 (2005), Appellant argues that Det. Hechs testified based on his specialized training and experience, and that his testimony could not have been offered unless he was qualified as an expert. Appellant further argues that, where the State sought to establish that fingerprints were not recoverable from the surface of a handgun, expert testimony was necessary. Appellant asserts that allowing this testimony was not harmless error because the testimony from Det. Hechs filled the "evidentiary void" of fingerprint and other forensic evidence.

The State contends that Det. Hechs' testimony was not impermissible expert opinion testimony, and it was thus not an abuse of discretion for the circuit court to admit such testimony. The State relies on *Fullbright v. State*, 168 Md. App. 168 (2006), to support the position that Det. Hechs' testimony was offered not for its truth, but to explain his conduct and rebut the issue raised by the defense as to the collection of fingerprint evidence. The State further contends that any error was harmless because Det. Hechs' testimony revealed a lack of knowledge regarding fingerprint evidence and thus would not have influenced the jury.

B. Analysis

"[T]he admissibility of expert testimony is within the sound discretion of the [circuit] court[.]" *Freeman v. State*, 487 Md. 420, 429 (2024) (internal citations omitted). The circuit court has wide latitude in this regard, and we review the court's decisions for an abuse of discretion; however, the court's decisions must be "in accordance with correct legal standards." *Id.* (quoting *Ehrlich v. Perez*, 394 Md. 691, 708 (2006)). Admission of lay opinion testimony which is based on a witness' specialized knowledge, training, or skill is legal error. *See Simpson v. State*, 214 Md. App. 336, 385 (2013), *rev'd on other grounds*, 442 Md. 446 (2015) (referencing *Ragland v. State*, 385 Md. 706 (2005)); *see also State v. Galicia*, 479 Md. 341, 389 (2022) ("If a court admits evidence through a lay witness" where the foundation for such evidence should have satisfied expert testimony requirements, "the court commits legal error and abuses its discretion.") (internal citation and quotation marks omitted).

For expert opinion testimony to be admissible, a witness must be duly qualified as an expert under Maryland Rule 5-702. Opinion testimony from a lay witness is limited to matters "rationally based on the perception of the witness[.]" Md. Rule 5-701. In *Ragland*, the Supreme Court of Maryland held that Rules 5-701 and 5-702 prohibit the admission of lay opinion testimony "based upon specialized knowledge, skill, experience, training or education." 385 Md. at 725. A law enforcement officer's opinion testimony which is based on his or her training and experience as an officer is thus not admissible as lay opinion testimony. *See State v. Blackwell*, 408 Md. 677, 690–91 (2009). When determining if an officer's testimony is based upon specialized training and experience, we consider whether

the knowledge or skill involved is "in the possession of the jurors" and "commonplace." *Wilder v. State*, 191 Md. App. 319, 368 (2010) (internal quotation marks and citations omitted). For example, the officer witnesses in *Ragland* testified that an interaction they had observed involving the defendant appeared to be a drug transaction; this opinion was based on the officers' training in the investigation of drug cases and years of experience in a narcotics unit. 385 Md. at 726. The Court held that this testimony was inadmissible as lay opinion testimony because of the clear "connection between the officers' training and experience on the one hand, and their opinions on the other[.]" *Id.*

However, an officer's expert opinion can be admissible as lay testimony under certain circumstances. In *Fullbright*, this Court was asked to determine whether an officer's testimony regarding his decision not to collect fingerprint evidence from a bloody knife was impermissible expert opinion testimony. *Fullbright v. State*, 168 Md. App. 168, 177 (2006). The officer witness, when asked about his decision, stated that it was difficult to recover fingerprints from wet surfaces. *Id.* at 176. His testimony established that this opinion was based on his training in the Police Academy and experience as an officer. *Id.* Nevertheless, we held that the circuit court did not err or abuse its discretion in admitting the testimony. *Id.* at 185–86. The basis was for several reasons. First, the officer's testimony was offered not for its truth, but "to explain his conduct as the investigating police officer[.]" *Id.* at 181. Second, the officer's testimony was not directed at an essential element of the crimes charged, but "was directed to the issue of the adequacy of the police investigation." *Id.* at 182. Finally, the testimony was considered anticipatory rehabilitation

evidence because the issue of the investigation had been raised by the defense's opening statement. *Id.* at 185.

Det. Hechs' testimony that "smooth surfaces are easier to get prints off of," though based in his experience as an officer, is admissible for the same reasons addressed in *Fullbright*. On cross-examination, the defense raised the issue of Det. Hechs' decision not to wear gloves while test firing firearms. Additionally, the defense raised the issue of the lack of fingerprint evidence in this case repeatedly, both during the opening statement and during cross-examination of multiple witnesses. The State therefore inquired of Det. Hechs his knowledge regarding recovery of fingerprint evidence not for the truth of whether handguns are good surfaces for recovering prints, but to explain his decision to handle the handgun without gloves. Additionally, the issue of whether fingerprints could be recovered from the handgun does not go to an essential element of the crimes charged but is a collateral issue regarding the adequacy of the investigation. As in *Fullbright*, the testimony at issue was not opinion evidence inadmissible under *Ragland*. *See* 168 Md. App. at 181–82.

Further, while in *Fullbright* the officer's testimony was considered anticipatory rehabilitation, the testimony at issue here was elicited during re-direct examination and was directly rehabilitative of the issue which was raised on cross-examination. The defense's questions regarding Det. Hechs' decision not to wear gloves impeached his credibility because it implied that he had interfered with the collection of forensic evidence. The State was therefore entitled to elicit rehabilitative testimony by prompting Det. Hechs to further

explain his decision. *See Fullbright*, 168 Md. App. at 184 (citing Md. Rule 5-616(c)(1)). The circuit court did not err or abuse its discretion by admitting Det. Hechs' testimony.

II. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION BY PERMITTING THE STATE'S REBUTTAL ARGUMENT REGARDING THE STOLEN HANDGUN.

During closing argument, Appellant made an argument regarding Khalid's identification of State's Exhibit 14, the handgun, and Khalid's credibility. Appellant noted Khalid's admission that he had provided false information on his application for a handgun license. Appellant argued that Khalid's testimony did not establish that he owned the handgun or that it had been stolen from Mike & Sons. Referring to the burglary, counsel for Appellant stated, "I don't really know what was taken that day. And frankly, I don't think there's any evidence of what was [taken] because we don't even know that there was a gun in the store." Appellant further argued, "I don't know if anything was stolen because as far as I know, whatever's in that top drawer was still sitting there. No officer ever opened it."

The State addressed this point during rebuttal argument by arguing,

> Another red herring is this, calling Mr. Khalid a liar. And my colleague touched on this, so I'll only touch briefly, which is to say that this is not about Mr. Khalid's credibility. Everything important that he had to say is demonstrated, like the fact that the gun is missing, like how do you know that's true? [Khalid] didn't just make up out of thin air that his gun is missing because they logged the serial number and three days later they got a hit for it when the defendant had it.

Appellant objected to this statement. The circuit court overruled his objection.

A. Party Contentions

Appellant argues that this was improper and prejudicial closing argument. Appellant asserts that no witness testified that law enforcement "got a hit" for the serial number of the handgun, and therefore the State argued a fact that was not in evidence. Appellant argues that this remark was prejudicial to the defense because "it conveyed that the gun, for which 'they got a hit,' had been reported stolen." Appellant asserts that this fact was "central to the charge of theft" for which he was convicted.

The State initially raises a preservation issue because Appellant did not object to a substantially similar statement also made during the State's rebuttal. If preserved, the State contends that the remark—that law enforcement "got a hit" for the serial number—was not improper because it is a reasonable inference from evidence admitted at trial. Further, the State argues that Appellant's contention that the remark was prejudicial is unsupported because "the evidence unequivocally showed that the gun was reported stolen." Even if the remark was improper, the State argues that it would not amount to reversible error because the weight of the evidence supporting Appellant's convictions was significant.

B. Preservation

We first address the State's argument that Appellant waived this issue by failing to object to a substantially similar statement prior to the remark at issue. "[A] defendant must object during closing argument to a prosecutor's improper statements to preserve the issue for appeal." *Shelton v. State*, 207 Md. App. 363, 385 (2012). The State asserts that this issue is not preserved because Appellant did not object to the following statement during the State's rebuttal:

> How do you know the anything was stolen? And the gun, [Khalid] gives the police the serial number. They put it into their tracking system. Three days later, [Appellant's] sitting on a gun, same serial number. Like, ding, here's the gun that was reported stolen three days ago. What does he mean, how do you know the gun was stolen? [Khalid] gave you the serial number.

While there are similarities between this statement and the challenged remark, the two are not identical. Appellant asserts that the challenged remark, to which he objected, argues a fact not in evidence because it conveys an inference that police connected Appellant's arrest to the July 16, 2022 burglary at Mike & Sons by searching NCIC for the serial number of the handgun. The prior remark which the State points to carries a similar implication but does not directly state the inference as does the challenged remark. Appellant's objection preserved his present challenge to the remark that police "got a hit" on the handgun's serial number.

C. Analysis

In closing argument, attorneys "may make any comment that is warranted by the evidence or inferences reasonably drawn therefrom." *Degren v. State*, 352 Md. 400, 429–30 (1999) (internal citation and quotation marks omitted). Circuit courts have broad discretion to control closing arguments, and the court's judgment will not be disturbed unless it is a clear abuse of discretion which prejudiced the defense. *See Grandison v. State*, 341 Md. 175, 225 (1995). While attorneys are afforded great leeway in making closing arguments, it is not proper to argue a fact not in evidence or that is not a matter of common knowledge. *See Jones v. State*, 217 Md. App. 676, 692 (2014) (citing *Donaldson v. State*, 416 Md. 467, 489 (2010) and *Wilhelm v. State*, 272 Md. 404, 438 (1974)). Reversal is not

warranted based on an improper statement unless the statement "actually misled the jury or [was] likely to have misled or influenced the jury to the prejudice of the accused." *Lawson v. State*, 389 Md. 570, 592 (2005) (quoting *Spain v. State*, 386 Md. 145, 158–59 (2005)). Prejudice is assessed using several factors: "the severity of the remarks, the measures taken to cure any potential prejudice, and the weight of the evidence against the accused." *Spain*, 386 Md. at 159.

Here, there was no evidence directly supporting the assertion that police searched NCIC and "got a hit" for the serial number following Appellant's arrest. There was, however, substantial evidence supporting such an inference. Khalid testified that he provided the handgun's serial number to Ofc. Donahue following the burglary. Ofc. Donahue testified that Khalid provided him with the serial number and explained not only that he entered the number into NCIC, but also as to the broader use of NCIC as an information-sharing tool among law enforcement agencies. Cpl. Thomas testified to seizing the gun from Appellant. He explained that prior to Appellant's arrest, he was unaware of the burglary at Mike & Sons, but that he later "became aware." He further stated that he used NCIC and another criminal database as a routine part of crime investigation. Given this information, a search of NCIC for the handgun's serial number is the logical explanation for how Cpl. Thomas "became aware" of the burglary.

Prosecutors are permitted to "make any comment that is warranted by the evidence *or inferences reasonably drawn therefrom*." *Degren*, 352 Md. at 429–30 (emphasis added). Based on the evidence adduced at trial, it was reasonable to draw the inference that the Rockville City and Montgomery County Police Departments connected the separate

investigations through the handgun's serial number, which was entered into NCIC and which both departments utilized. Thus, it was not improper for the State to imply that police "got a hit" on the serial number.

Even were we to find the remark was improper, we would not find prejudice sufficient to warrant reversal. First, we note the remark was not severe. The remark was isolated and did not pervade the entire argument. *Contra Donaldson*, 416 Md. at 497–98 (wherein the prosecutor's repeated comments that the defendant was the "root of all evil" underlying the local drug trade pervaded the entire argument). Appellant compares this case to *Jones v. State*, wherein the prosecutor asserted that a white cell phone charger must have been an iPhone charger without a basis in the evidence. 217 Md. App. at 693. In *Jones*, we found this isolated remark severe because it related to an issue that was central to the case, witness credibility. *Id.* at 696. This case, however, is unlike *Jones*, because the issue of how police came to discover that the handgun had been reported stolen was not central to the case. Rather, it was a tangential issue intended only to rebut part of the defense's closing argument attacking Khalid's credibility. *See Degren*, 352 Md. at 433 ("[P]rosecutors may address during rebuttal issues raised by the defense in its closing argument.") (citing *Blackwell v. State*, 278 Md. 466, 481 (1976)).

Second, the jury was instructed prior to closing arguments that "[o]pening statements and closing arguments of lawyers are not evidence" and that "if your memory of the evidence differs from anything the lawyers or I may say, you must rely on your own memory of the evidence." In *Degren* we observed that "the trial court declined to provide the jury with curative instructions regarding the prosecutor's comments because it

perceived no error to rectify," 352 Md. at 433, but nevertheless "[t]he court's instructions [preceding closing arguments] clearly define the jury's role, the presumptions afforded the defendant, how to consider comments by the attorneys, and how to judge witness testimony." *Id.* at 434–35. The Court held that the circuit court's instructions preceding closing argument were sufficient to prevent any prejudicial effect resulting from the prosecutor's remark that the defendant had a motive to lie. *Id.* at 435. Here too, the remark was not improper and the circuit court properly overruled the objection to the remark. Even had the remark been improper, given its minimal significance, the instruction to the jury that they should not consider arguments to be evidence and should rely on their own memories was sufficiently curative.

Finally, we consider the weight of the evidence supporting Appellant's convictions. *See Spain*, 386 Md. at 159. Appellant was convicted of possessing a firearm as a prohibited person on July 19, 2022—the date of his arrest—and of theft. Appellant contends that the State's remark influenced the jury's verdict on theft because "it conveyed that the gun . . . had been reported stolen." The court instructed the jury that possession of recently stolen property without reasonable explanation may create an inference of theft. However, the State's remark is tangential to the issue of whether the handgun was reported stolen. The remark does not directly convey that the handgun was stolen, but rather provides an explanation for how Rockville City Police learned that this was so. Ample evidence supported the fact that the handgun was reported stolen, including testimony from Khalid that his gun was stolen on July 16, 2022, and he had given the serial number to the police; testimony from Ofc. Donahue that he entered the serial number into NCIC; and testimony

from Cpl. Thomas that he learned of the burglary following Appellant's arrest. Additionally, when the handgun was discovered three days later, it was in direct contact with Appellant's person, placed under his leg while he was seated. The weight of the evidence supporting the theft conviction was sufficient and was not likely to have been influenced by the State's remark.

The State's remark that police "got a hit" on the handgun was not improper and would not have been unfairly prejudicial to the defense. Rather, the remark fell within the broad latitude afforded attorneys in making closing arguments, and the circuit court did not abuse its discretion by permitting the remark. *See Degren*, 352 Md. at 429–30; *Grandison*, 341 Md. at 225.

III. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION BY FINDING THAT THE CHAIN OF CUSTODY FOR THE HANDGUN WAS ADEQUATELY ESTABLISHED.

During his testimony, Cpl. Thomas was asked if he recognized State's Exhibit 14 as the handgun he seized from Appellant, and he confirmed that he did. Appellant objected, and the circuit court overruled the objection.[4]

Later, at the close of the State's case, Appellant reasserted the issue by arguing that the State had not generated a jury instruction for an inference of theft from possession of recently stolen goods. Appellant argued that the State had not established a chain of custody

[4] Just prior to this exchange, Appellant made an objection to Cpl. Thomas' explanation of rendering the handgun safe. The bench conference that followed this objection is transcribed as unintelligible. Appellant's objection to Cpl. Thomas' identification of the handgun was a "renewed" objection, apparently referring to the prior unintelligible bench conference. Additionally, the transcript attributes the renewed objection to the State. However, it is clear in context, and the parties agree, that it was Appellant who made the objection.

for the handgun. He asserted that Cpl. Thomas was not the officer who collected the handgun from Appellant, and that there was not a sufficient foundation to identify the handgun as the one seized during Appellant's arrest. Appellant also asserted that Cpl. Thomas' name was not on the "evidence log" for the handgun. Appellant indicated that this issue would form part of the basis for his renewed motion for judgment of acquittal.[5] Appellant also renewed his objection to Cpl. Thomas' testimony identifying the handgun. The court overruled his objection.

At the close of all evidence, Appellant renewed his motion for judgment of acquittal. He again asserted that the chain of custody for the handgun had not been adequately established, restating his prior arguments regarding Cpl. Thomas' testimony. The court denied the motion.

A. Party Contentions

Appellant contends that the State did not establish a chain of custody adequate to authenticate State's Exhibit 14 as the handgun seized from Appellant during his arrest. Appellant argues that no evidence was presented regarding the Rockville Police Department's recovery, handling, or safekeeping of the handgun. Appellant asserts that the absence of testimony from Cpl. Lally is a gap in the chain of custody.

The State asserts that Appellant waived this argument by not objecting to identification of the handgun by Khalid or Det. Hechs. The State argues that, during a

[5] It appears that Appellant made a motion for judgment of acquittal at the close of the State's case, prior to the discussion regarding jury instructions. The basis for his motion is transcribed as unintelligible. The circuit court denied the motion.

colloquy regarding Cpl. Lally's testimony, Appellant stated that "we don't have an issue with chain of custody" and this constituted an affirmative waiver of the issue. The State further argues that chain of custody for the handgun was adequately established by the evidence adduced at trial. The State asserts that any deficiencies in chain of custody evidence for a handgun go to the weight of the evidence and not to admissibility.

B. Preservation

Appellant initially objected when Khalid identified State's Exhibit 14 as his handgun; however, Appellant did not renew his objection after a further foundation was laid, and the handgun was admitted into evidence without objection. Appellant likewise did not object when Det. Hechs testified that he recognized State's Exhibit 14 as the handgun identified in his test fire report. The State points to these failures to object to support the contention that Appellant has not preserved the issue of chain of custody. Additionally, the State points to the following colloquy which took place at the end of the first day of trial:

> [STATE]: . . . There is one witness who can't come in the morning. He's literally chain of custody on the gun. He collected the gun at the scene of the arrest and put it into evidence. And I would like to call him now, very briefly, just for that purpose.
>
> THE COURT: Do we have a stipulation on that?
>
> [DEFENSE]: No, I don't think -- *we don't have an issue with chain of custody*. I think there are some things we'd want to cross-examine on since he was on scene with the [recovery]. So obviously, our client's to be here with the gun recovery and all that.
> . . . .
> [STATE]: I honestly think it might be faster to just put him on than do that.

(emphasis added). The circuit court agreed to hold the jury for Cpl. Lally's testimony. The State then called Cpl. Lally before learning that he had already departed the courthouse due to a scheduling misunderstanding.

The State contends that Appellant's comment regarding Cpl. Lally's testimony, that "we don't have an issue with chain of custody," affirmatively waived, or forfeited, the issue from our review. It is true that forfeited rights are unreviewable on appeal, even for plain error. *State v. Rich*, 415 Md. 567, 580 (2010) (quoting *United States v. Perez*, 116 F.3d 840, 842–45 (9th Cir. 1997)). This is the case because "[i]t is the clear responsibility of counsel to share with the trial judge the obligation to keep the trial on the tracks," and affirmative waiver of an issue not only fails to alert the court to error but also risks misdirecting the court. *Robson v. State*, 257 Md. App. 421, 460–61 (2023).

The present case, however, is not an instance of affirmative waiver. The defense's comment was responsive to the court's inquiry into whether there was a stipulation regarding chain of custody, a question which in context was directed at seeking to shorten the duration of trial and allow the jury to depart in a timely manner. The defense's response indicated that there was not a stipulation and that the defense did seek to cross-examine Cpl. Lally. The State then indicated an understanding that the topic of discussion was the timing of Cpl. Lally's testimony and the possibility of a stipulation; neither party indicated a belief or understanding that establishing chain of custody was unnecessary.

Additionally, Appellant did raise an issue regarding the chain of custody established by the State's case, specifically concerning Cpl. Thomas' testimony. This was first raised

as an objection during Cpl. Thomas' testimony. Appellant then made a motion for judgment of acquittal at the close of the State's case and again raised the issue of chain of custody. Appellant subsequently renewed his motion for judgment of acquittal at the close of all evidence, again raising chain of custody as an issue. The Supreme Court of Maryland has indicated that "[t]he establishment of chain of custody is a trial court determination made after considering all of the evidence presented." *Wheeler v. State*, 459 Md. 555, 561 (2018). The State asserts that due to the defense's comment, it was not on notice of the need to call another chain of custody witness; however, it is the State's burden to establish chain of custody. *See id.* Appellant's motions for judgment of acquittal preserved his objection to chain of custody with respect to Cpl. Thomas' testimony.

However, Appellant did not object to the ultimate issue of the handgun's admissibility during Khalid's testimony when it was established that State's Exhibit 14 was the handgun belonging to Khalid which was stolen from his store. He also did not object to Det. Hechs' identification of the handgun or his description of retrieving the handgun in its sealed box, test firing it, and returning it to the evidence unit. Thus, the scope of our review does not extend to those issues and is limited to chain of custody of the handgun from the time of Appellant's arrest to the time of the test fire.

C. Analysis

This Court reviews a circuit court's determinations regarding the admissibility of evidence for abuse of discretion. *State v. Simms*, 420 Md. 705, 724–25 (2011) (internal citation omitted). Maryland Rule 5-901 states that "[t]he requirement of authentication . . . as a condition precedent to admissibility is satisfied by evidence sufficient to support a

finding that the matter in question is what its proponent claims." In the case of physical evidence, "the law requires the offering party to establish the 'chain of custody,' *i.e.*, account for its handling from the time it was seized until it is offered in evidence." *Johnson v. State*, 240 Md. App. 200, 211 (2019) (quoting *Lester v. State*, 82 Md. App. 391, 394 (1990)). Most often, this is established through witness testimony negating a possibility of tampering or of a changed condition. *Easter v. State*, 223 Md. App. 65, 75 (2015) (citing *Jones v. State*, 172 Md. App. 444, 462, *cert. denied*, 399 Md. 33 (2007)). The State's burden is not to establish chain of custody beyond a reasonable doubt, but to prove that there is "a reasonable probability that no tampering occurred." *Johnson*, 240 Md. App. at 211 (internal quotation marks and citation omitted). Any gaps in the chain of custody typically do not require the circuit court to exclude evidence, but rather go to the weight of the evidence. *See Wheeler*, 459 Md. at 569; *Easter*, 223 Md. App. at 75.

Here, the evidence showed that the handgun was seized from Appellant during his arrest by Cpl. Thomas. Cpl. Thomas rendered the handgun safe by racking the slide to the rear and removing the magazine. Cpl. Lally then took possession of the handgun and submitted it into evidence. Cpl. Thomas explained that this means the handgun was stored at the police station following Appellant's arrest. Det. Hechs then explained that to conduct the test fire, he and his partner retrieved the handgun from the "evidence unit" and returned it to the same location once the test was completed. Det. Hechs noted that as part of the test process, he verified that the box containing the handgun was sealed prior to the test and repackaged after the test. Cpl. Thomas pointed out at trial that the handgun was being held securely in a box with zip ties. Both the State and defense counsel indicated that the

evidence packaging containing the handgun included information about the date and location of recovery and the name of the officer who submitted it into evidence. Additionally, while deliberating, the jury could view and compare the serial number on Khalid's photograph, on the test fire report, and on the handgun itself.

The facts of this case are similar to those in *Wheeler*, wherein an officer testified to the process of seizing and storing heroin recovered during an undercover drug purchase. 459 Md. at 567. The officer explained that the undercover officer retains the seized items after a purchase, then hands them off to a second officer or takes them to the packaging officer personally. *Id.* The packaging officer then processes the items and stores them. *Id.* Although the officer who testified stated that he did not personally observe the packaging officer labeling and storing the items, his testimony was sufficient to create a reasonable probability that the drugs seized were the same presented at trial. *Id.* at 568–69. Here, as in *Wheeler*, Cpl. Thomas noted that he was not the officer who personally placed the seized handgun into evidence. However, his testimony identifying the handgun as the one he seized, as well as his and Det. Hechs' explanation of the process involved in seizing, storing, and testing the handgun, created a reasonable probability to assure the jury that the handgun had not been at risk of tampering. *See Easter*, 223 Md. App. at 75.

Any gap in the chain of custody created by Cpl. Lally's absence was not grounds to exclude the handgun from evidence. *Id.* Rather, the gap formed a permissible basis for defense counsel to raise an argument regarding the weight the jury should give to the evidence. *See Jones*, 172 Md. App. at 463. Defense counsel did raise such an argument and ensured that the jury was aware that Cpl. Thomas was not the officer who placed the

handgun into evidence after it was seized. The circuit court did not abuse its discretion by denying Appellant's challenge to chain of custody on the handgun.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.